

These comments represent the salient points from comments about Trust Responsibility

From Ex. 6 Personal Privacy (PP) How well would a poor minority be able to defend themselves [against impacts outside the reservation boundary] anyway? This totally ignores that the federal government holds these rights in trust for the Tribes. The government must defend these rights as their own and all decisions must be in the Tribes' favor.

It is time for the federal government to stand up to their trust responsibilities under the Winters Doctrine.

From Ex. 6 Personal Privacy (PP) **Cheyenne River Sioux Tribe Chairman:**

The Tribe's Rights and Trust Resources in the vicinity of the Dewey-Burdock Uranium Mine

- **Reserved water rights:** The Tribe enjoys reserved water rights in the Missouri River Basin as well as related groundwater in an amount sufficient to fulfill the purposes of the Reservation. See *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963). These reserved water rights are a trust resource for which the United States owes a fiduciary duty. These rights are a function of the Tribe's extant treaty rights. See Treaty of Fort Laramie with the Sioux, Etc., 11 Stat. 749 (Sep. 17, 1851); Treaty with the Sioux -Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee, 15 Stat. 635 (Apr. 29, 1868). The Tribe retains reserved water rights in off-Reservation waterways and other bodies of water in the Missouri River Basin as well as groundwater and aquifers outside its Reservation.
- **Hunting and fishing rights:** The Tribe enjoys hunting and fishing rights in Lake Oahe, the reservoir of the Missouri River that are subject to the United States' trust duty. The rights are a function of the Tribe's extant treaty rights and have been preserved by Congress. See Treaty of Fort Laramie with the Sioux, Etc., 11 Stat. 749 (Sep. 17, 1851); Treaty with the Sioux-Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee, 15 Stat. 635 (Apr. 29, 1868); Act of Sep. 3 1954, Pub. L. 83-776, 68 Stat. 1191. Numerous off-Reservation tributaries and aquifers belong to the Lake Oahe hydrologic system and consequently will impact the Tribe's retained hunting and fishing rights in Lake Oahe.
- **Historic, spiritual, and cultural resources:** There are numerous sites of historic, spiritual, and cultural significance to the Tribe throughout the Tribe's large aboriginal territory, but especially within the boundaries of the lands reserved to the Tribe in the Treaty of Fort Laramie with the Sioux, Etc., 11 Stat. 749 (Sep. 17, 1851). Furthermore, the Tribe's reserved water rights themselves constitute a spiritual and cultural resource in light of the primary role that water plays in Lakota religious sacraments, which require environmentally and ritually pure water. (A map showing the Tribe's 1851 territory is enclosed herewith.)

United States Trust Duty

The United States has a two-fold trust duty to the Tribe. Courts have long recognized the "existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The courts are clear that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (emphasis in original) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)).

Secondly, the federal government has a specific trust duty to protect the rights reserved in the 1851 and 1868 Fort Laramie Treaties. The Tribe was a party to the 1851 and 1868 Fort Laramie Treaties, which reserved land and water to the Tribe in order to fulfill the purpose of the

Reservation to provide for self-sufficiency. See *Winters v. United States*, 207 U.S. 564 (1908). The reserved water right recognized in the Winters doctrine, and reserved for the Tribe, includes the right to clean, safe water. See, e.g., *United States v. Gila River Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996). Likewise, the Tribe has retained its right to hunt, fish, and gather on the Reservation and in Lake Oahe. Act of September 3, 1954, Pub. L. 83-766, 68 Stat. 1191; *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (noting that Congress explicitly has reserved the Cheyenne River Sioux Tribe's original treaty rights, including the right to hunt and fish, on Lake Oahe); see also *United States v. Dion*, 476 U.S. 734, 738 (1986) ("Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them "). The Tribe's water rights include a right to water that is sufficient in amount and quality to support hunting and fishing rights. *United States v. Adair*, 723 F.2d 1394, 1409, 1411 (9th Cir. 1983). As a result of the federal government's trust responsibilities to the Tribe, the EPA must ensure that such trust resources are preserved in any activity that may impact the Tribe's rights, including the Underground Injection Control Draft Area Permit and Proposed Aquifer Exemption decision for Dewey-Burdock Uranium In-Situ Recovery Site.

Significantly, the EPA along with several other departments of the United States Federal Government, entered into a *Memorandum of Understanding on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites on September 23, 2016*. The Memorandum acknowledges that federal agencies hold in trust many culturally important sites held sacred by Indian tribes, and federal agencies are responsible for analyzing the potential effects of agency projects carried out, funded, or permitted on historic properties of traditional cultural and religious importance to Indian tribes including sacred sites. Additionally, international law, treaties, and jurisprudence has repeatedly affirmed the right of Free Prior Informed Consent. See Declaration on the Rights of Indigenous People, art. 10, United Nations (Mar. 2008). The purpose of Free Prior Informed Consent is to establish bottom up participation and consultation of an Indigenous population prior to the beginning of a development on ancestral land or using resources within the Indigenous population's territory. *Id.*

Note: On the EPA website, I found a memorandum entitled *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights*. It was signed by Departments of the Interior, Agriculture, Justice, Commerce, Defense, Transportation, the EPA the ACHP and the White House Council on Environmental Quality. Signature dates range from Sept through Nov 2016. This MOU addresses treaty rights and rights related to natural resources and can be found at:

[HYPERLINK "<https://www.epa.gov/tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection>"]

On the ACHP website I found an MOU entitled: *Memorandum of Understanding for the Coordination and Collaboration for the Protection of Indian Sacred Sites 2016*

It was signed by Departments of Defense, Interior, Agriculture and Energy and the ACHP, but not EPA. However, EPA policy is in line with the intent of this MOU.

This MOU can be found at:

[HYPERLINK "<https://www.achp.gov/sites/default/files/2018-06/MoUfortheCoordinationandCollaborationfortheProtectionofIndianSacredSites2016.pdf>"]